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No. 455.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1928.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

EDWARD H. JOHNSON, RESPONDENT.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

MYRTLE J. JOHNSON, RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF CASE.

These are passenger carrier *res ipsa loquitur* cases. Plaintiffs had judgments in the trial court; the defendant did not make a motion for a new trial; did

not give the trial court an opportunity to pass upon alleged errors, but sued out writs of error, under which the amount of the verdicts could not be questioned.

The Circuit Court of Appeals for the Eighth Circuit on July 2nd, last, affirmed the judgments.

Under Rule 28 of the Circuit Court of Appeals, the defendant had sixty days in which to move for a rehearing. The defendant abstained from making such a motion and thus deprived that court of an opportunity to correct any alleged errors.

The Court of Appeals in an opinion by Judge Symes said:

> "3. Both counsel for the plaintiff who addressed the jury stated that the defense charged that:
>
> > 'The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.'
>
> "And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination. We

therefore deem it proper to observe that this line of argument was likely to create (Fol. 481) prejudice, and did not aid the court or jury in the performance of their duties.

"The record containing no reversible errors, the judgment in each of the two cases is affirmed."

This Court granted writs of certiorari and ordered that:

"The argument is to be limited to the question whether the alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial."

We understand the order limiting argument confines counsel to a discussion of the matter of syphilis mentioned in the opinion of the Circuit Court of Appeals.

Suffice it to say that the "Statement of the Case" prepared by the defendant is misleading and inaccurate. If the Court desires a complete and accurate "Statement of the Case" as to how the injuries were received we refer the Court to "Appendix A" of Brief of Respondents in Opposition to Writs of Certiorari.

Notwithstanding the order of this Court limiting argument, as aforesaid, the defendant has seen fit in its brief to disobey that order by calling this Court's attention to many matters of argument and other matters to which no objection of any kind was made at the trial (See defendant's Brief, pages 7, 8, 9, 10 and 11).

We submit that such extraneous argument is improper and should be disregarded.

Citations to Record Showing That Defense Was "Syphilis."

That the defendant in its cross examination of plaintiff and Imogene Johnson and all of plaintiff's doctors attempted to prove that Myrtle Johnson was suffering from syphilis, and that that was the cause of her paralysis, is easily demonstrated by a reading of the record. The attempt to prove that she was suffering from syphilis began with the very first witness, Imogene Johnson (page 155), and continued and persisted with many witnesses thereafter. The cross examination on this subject is too voluminous to quote in this brief. The most important parts will be found upon the following pages of the Record: 155, 156, 157, 173, 178, 180, 181, 184, 185, 188, 205, 282, 285, 324, 329, 330, 331, 332, 333, 335, 336, 338 and 339.

Beginning with Imogene Johnson counsel sought to show that Myrtle Johnson had an "eruption of the skin" (which is one of the symptoms of syphilis); "didn't it look a little bit as though it was a kind of pimple and yet it wouldn't come to a head" (p. 155), (a symptom of syphilis); defendant tried to get Imogene Johnson to say that Myrtle Johnson had "hypodermic injections" (p. 157), (ordinary treatment for syphilis); at page 173 plaintiff asked Dr. St. Elmo Sanders "has all the improvements that is to take place, taken place," and Mr. Marley objected because the question did not include "any tests of the blood that he made, now. There is a treatment here, iodide of potassium and all those elements ought to be taken into consideration in giving an opinion upon this point"

(iodide of potassium is a well recognized treatment for syphilis); at page 188 defendant again asked Dr. Sanders about his administration of iodide of potassium (attempting to show it was given for syphilis); and at page 180 defendant sought to prove by its cross examination of Dr. Sanders that "they some times took blood tests that show negative, when as a matter of fact there is a positive condition there" (the inference sought was that Myrtle Johnson had syphilis regardless of the negative test); and by the same cross examination on page 181 defendant attempted to prove that even though the syphilis was not in active form there was present a "*luetic condition,*" and that the proper thing for the doctor to have done was to have taken a spinal test and not have relied upon a blood test; in the cross examination of Dr. Richman (pp. 184-185) defendant sought to show that the Wassermann test was unreliable and that the plaintiff might have had syphilis regardless of the negative finding by the blood test and that even though there was a negative finding she still might have a "luetic condition" of syphilis, and that when the syphilis "gets down into the nerves, and the tissues" a lumbar test should be made (p. 185); and that if the attending doctor "*had a suspicion in his mind that the* **plaintiff** *was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?*" (p. 185); (later examination shows that defendant contended that neurosyphilis was that stage of syphilis in which the disease germ "*spirochaeta pallida,*" became active in the nerves and their sheaths); in the cross ex-

amination of Dr. Bahr (p. 188) the defendant sought to prove the same thing, and that the attending physicians ignorantly or negligently failed to make a spinal column test, the inference being perfectly plain that the defendant was contending that Myrtle Johnson had syphilis which fact could have been proven if a lumbar test had been made; in the examination of Dr. St. Elmo Sanders at page 192, the subject of "locomotor ataxia" was discussed when defendant's counsel said: "I don't believe there is a question of locomotor ataxia in this case at all,' and then Mr. Wickersham said: "If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question." And then Mr. Marley said: "I am saying now there was nothing said about locomotor ataxia, and he's going into something that isn't within the range of the testimony as developed at this time * * *." Upon objection being sustained, Mr. Wickersham said: "The idea was, Your Honor, that the evidence about the blood tests—*I want to go into it if there was any question about it.*" (It will be noted that Mr. Marley was merely claiming there was no evidence of locomotor ataxia, but was claiming, nevertheless, that Myrtle Johnson had neurosyphilis (secondary stage) and not locomotor ataxia, which is a symptom of the tertiary stage); at page 205 when certain X-ray pictures had been identified and offered in evidence, Mr. Marley objected to their reception, "Because it would embody any mistakes they made in the diagnosis of her case." (Mr. Marley was still hammering at "syphilis" before the jury); in the cross examination of Myrtle Johnson, page 282, defendant

tried to get the plaintiff to admit that the serum that was injected into her arm by Dr. Geraughty was "salvorsan" (a treatment for syphilis); and again at page 285 counsel tried to bring out that the internal medicine administered was "bismuth," and at page 286 that "hypodermic injections" were administered; in the examination of Dr. Geraughty at pages 323, 324, the doctor had testified that plaintiff's skin was "perfectly clear, no existence of eruption" and he was then asked about the "bony condition" and he answered: "In syphilis the bones of the body seem to be affected very prominently, pains in the bones, especially in the shin bones, it has been very characteristic in the chronic cases," thereupon Mr. Marley said:

"We object to that because there is no evidence of a chronic case."

And Mr. Wickersham said:

"Let the record show that he doesn't claim that."

Then Mr. Marley said:

"The chronic case would be in the tertiary state."

Plaintiff was attempting to show that syphilis did not exist in any stage, either first, second or third, and when the doctor stated that pains in the bones were characteristic in the chronic cases, meaning third stage, Mr. Marley objected because there was no evidence that the disease in this case was in the third stage, but would make no admission that it did not exist in the first or second stages; that it is plain, beyond dispute, that the defendant was claiming that the plaintiff was suffering from syphilis in the second stage, that is, after the first stage when the syphilis germ "gets down into

the nerves and the tissues" (p. 184); that defendant was claiming that she was suffering from syphilis in the second stage is clearly evident from the defendant's cross examination of Dr. Geraughty and particularly at page 331 where the following occurs:

> "A. As a rule the secondary state, secondary symptoms is the skin."
> "Q. This germ is what is called the spirochaeta?"
> "A. Yes, sir."
> "Q. *Spirochaeta pallida*, that is the full name, the first test they use is what is called the Wassermann test of the blood to find out that condition?"
> "A. Yes, sir. Wassermann test is used."
> "Q. After it gets beyond that stage and gets in the stage of neurosyphilis, the blood test is not accurate."

(The defendant was contending that the taking of the Wassermann test and the giving of iodide of potassium, and the general conditions demonstrated that the plaintiff had syphilis and that being in the second stage of syphilis, to-wit, neurosyphilis, the blood test which was given was not accurate and that the defendant could rightfully contend that she had syphilis in the second stage.)

Defendant evidently tried to show in the cross examination of Dr. Geraughty (p. 332) that the doctor "became suspicious of locomotor ataxia"; and on the same page attempted to show by the doctor that "*lesions in what is called neurosyphilis*" "*come along in the tissues and form along in the nerves what is called gummatous formations*" and "*tubercules*" that "*press on the nerves, the tissues that is next to it*" and *keeps on increasing until it presses down and paralysis is*

the result" and that such pressure "is along the arachnoid membrane" which "is between the dura mater and the pia mater" and that "it also gets in the meninges" which "covers the brain, the spinal cord and everything" and "*after that is done, don't it begin to form there so as to paralyze one side of the body and by pressure cause what you call occlusion*" (p. 333) and "*presses down, and isn't there a formation there what you doctors call a thrombosis formation*" (*here was a definite attempt by counsel for defendant to prove that the paralysis in question was due to syphilis and not to traumatism*); at page 335 defendant's counsel again sought to prove syphilis and asked Dr. Geraughty, on cross examination:

> **By Mr. Marley**: "Now isn't it a fact, Dr. Geraughty, that in neurosyphilis that it is slow and insidious, it is true, but it sometimes reaches a state that even a slight shock will bring on the paralytic stroke, hemiplegia, as you call it?"

The doctor answered:

> "A. Yes, occasionally. Occasionally a case can come quick under those circumstances."
> Mr. Marley: "That is all."

The defendant's counsel was evidently satisfied with this answer and said "That is all"; thereupon the following re-direct examination was had:

> By Mr. Wickersham: "Q. Explain that situation as far as the evidence in this case is concerned?"
> "A. The evidence in this case, of course, points away from that. Had this patient shown symptoms and given other evidence of having had an old

syphilis and then had an injury, then it is possible that a quick paralysis might have occurred with previous history, if the patient had been worked up to the point where—could have been worked up to that point, but with the history showing the traumatic condition, the evidence points to traumatic hemiplegia rather than neurosyphilis."

"Q. AND IF SHE HAD HAD SUCH A NEUROSYPHILIS AS COUNSEL INDICATES, IT WOULD HAVE BEEN NATURAL AND REASONABLE THAT YOU WOULD HAVE HAD SOME EVIDENCE OF IT FROM THE GLANDS?" (336).

"A. Yes."

The last quoted question ("AND IF SHE HAD HAD SUCH A NEUROSYPHILIS AS COUNSEL INDICATES") is a positive statement to opposing counsel, to court and jury that the defense was neurosyphilis; yet the defendant in no manner disclaimed that such was a fact; the plaintiff and the court had a perfect right to assume that such was the defense.

At page 338 defendant on cross examination of Dr. Hines said: "Doctor, did she tell you that she had a Wassermann test and that it showed positive?" (an effort to prove syphilis). On cross examination of Dr. Mella, page 339, defendant's counsel asked: "But doctor, you didn't make any examination as to a blood condition at all" (defendant again directs the jury's attention to syphilis); on the cross examination of Dr. Krall, page 356, defendant again tried to show that plaintiff admitted that the Wassermann test showed positive, and at page 357, attempted to show the administration of bismuth.

The cross examination by defendant of plaintiff, and Imogene Johnson and all seven doctors furnishes abundant evidence that defendant was attempting to prove that plaintiff had syphilis and when Mr. Chilcott in his argument charged: "That is the defense in this case, that she had the syphilis" Mr. Marley merely said: "I object to that, Your Honor, there is no evidence of that at all, it isn't proper argument." Can there be any question as to the propriety of the Court's ruling that "The objection is overruled, in view of the examination of the witnesses, and of the testimony in the case?" The sole objection was: "There is no evidence of that at all." The record is full of evidence that such was the defense. It was clearly established that that was the defense.

BRIEF.

The Writs of Certiorari should be dismissed and the judgments affirmed for the following reasons:

1. These cases do not involve "principles, the settlement of which is of importance to the public as distinguished from that of the parties."

Layne & Bowler, Corp. Petitioners v. *Western Well Works, et al.*, 67 L. Ed. 712.

Federal Trade Commission, petitioner, v. *American Tobacco Co.*, 71 L. Ed. 1193.

United States of America, petitioner, v. *James J. Johnston*, 69 L. Ed. 925.

Southern Power Co. v. *North Carolina Public Ser. Co. et al.*, 68 L. Ed. 413.

2. It has been the practice of this Court not to grant writs of certiorari for alleged improper argument even though Circuit Court of Appeals holds the argument improper and yet affirms the judgment.

Michigan Mutual Life Ins. Co. v. *Oliver*, 256 Fed. 212.

Writ of certiorari denied June 9th, 1919, 63 L. Ed. 1187.

3. The language employed by Judge Symes in the opinion of the Circuit Court of Appeals was unfortunate, and in our judgment, does not accurately express the judgment of the court.

See R. 155, 156, 157, 173, 178, 180, 181, 184, 185, 188, 205, 282, 285, 324, 327, 330, 331, 332, 333, 335, 336, 338, 339, 420.

Bliss on Code Pleading, Sec. 329.

Ford v. *Kansas City*, 181 Mo. 137.

Greenway v. *James*, 34 Mo. 326.

Patton v. *Fox*, 169 Mo. 106.

4. The argument complained of was proper. The record shows conclusively that the defendant attempted to prove "Syphilis" as a defense even though it put no witness on the stand to prove it; defendant did not object to argument that defense was syphilis, but limited its objection to argument that syphilis would bar plaintiff from society and implied indecency; the exceptions were inadequate; the limits of argument were within the sound discretion of the trial court and there was no abuse of discretion. The argument was not prejudicial to defendant.

United States v. *Hammond*, 226 Fed. 849.
Buesker v. *Moore*, 174 Fed. 368.
A. T. & S. F. Ry. Co. v. *Nichols*, 2 Fed. (2nd) 12.
United States v. *U. S. F. & G. Co.* 236 Fed. 696.
Odgers on Libel and Slander (4th Ed.) p. 48, Sec. 2.
Newell on Libel and Slander (3rd Ed.) p. 240.
Golderman v. *Stearns*, 7 Gray, 181.
King v. *Pillsbury*, 115 Me. 528.
Grand Trunk Ry. Co. v. *Blay*, 297 Fed. 605.
Brady v. *Traction Co.*, 140 Mo. App. 421.
Remus v. *U. S.*, 291 Fed. 501.
Ostertag v. *Railroad*, 261 Mo. 457.
Morrill v. *Palmer*, 68 Vt. 1.
Home Benefit Ass'n v. *Horne*, 290 S. W. (Tex.) 226.
I. & G. Ry. Co. v. *Ervin*, 64 Tex. 535.

ARGUMENT.

1. These cases do not involve "principles, the settlement of which is of importance to the public as distinguished from that of the parties."

We recognize that this Court has the power and right to have these cases certified, but we respectfully submit that the limits of argument by counsel can, in an ordinary negligence case, as this, safely be left to the sound discretion of the trial Court subject to review by the Circuit Court of Appeals. This Court has earned the commendation of the American Bar for its effort to limit its jurisdiction and the number of appeals and writs to be heard by this Court, but we submit that the sustaining of these writs will be an encouragement to counsel in many cases to file similar petitions and thus a part of the good work already done by this Court will be undone.

This is a purely private controversy. The matter involved is of no importance to the public. The principle of law involved is fundamental and is known to all practitioners. All that is here involved is the application of the principle to the facts of this case.

2. It has been the practice of this Court not to grant writs of certiorari for alleged improper argument even though the Circuit Court of Appeals holds the argument improper and yet affirms the judgment.

The case of *Michigan Mutual Life Ins. Co. v. Oliver*, 256 Fed. 212, was a suit to collect insurance for death; the defense was suicide; the plaintiff's attorney in

argument to the jury went *outside the record* and charged that the defendant removed the case to the Federal Court in order to get away from "Conecuh County where the public knew the facts of this case." The trial court upon objection ruled the argument proper; the Court of Appeals (Fifth Circuit) held the argument improper but affirmed the judgment, exactly what was done in the cases at bar. This Court on June 9th, 1919, 63 L. Ed. 1187, denied a writ of certiorari therein.

3. The language employed by Judge Symes in the opinion of the Circuit Court of Appeals was unfortunate, and in our judgment, does not accurately express the judgment of the court.

It is a very unpleasant task to criticise an opinion of a Court that has decided a case in our favor, but it becomes necessary in this instance. However distasteful the task may be, we feel it our duty to frankly discuss Judge Symes' opinion.

Judge Symes said: "*We find no justification for this assumption*" to wit, that the defense in the case was syphilis.

We submit that Judge Symes was clearly in error in this conclusion. The record conclusively establishes that syphilis was a defense as we will point out under Point 4 herein.

Judge Symes further said: "*An affirmative defense of this character cannot ordinarily be proved by cross examination.*"

We respectfully submit that this statement is erroneous. "Contributory negligence," and "Assump-

tion of risk," for instance, are affirmative defenses; they are proved every day *solely by cross examination.*

> "In an action for negligence, by which property or the person is injured, the fact that the injury results from the negligence of the defendant, is put in issue by a general, denial, and, hence, he may show affirmatively, under such denial, that the injury arose from some other cause."
> Bliss on Code Pleading, Sec. 329.

> "Under a general denial defendant may prove any fact which goes to show that plaintiff never had a cause of action against him."
> *Greenway* v. *James*, 34 Mo. 326.
> *Patton* v. *Fox*, 169 Mo. 106.

It is difficult to understand just exactly what Judge Symes meant in the use of the phrase "affirmative defense." An "affirmative defense" ordinarily is one that must be specially pleaded. It may be that Judge Symes inadvertently assumed that it was necessary to plead "syphilis" as a defense before the defendant could rely thereon. If he did, then such erroneous conception of the law explains his language. That it is not necessary to specially plead "syphilis" as a defense is fundamental law. Under a general denial the defendant may establish by testimony of its own or by cross examination of plaintiff's witnesses any fact which goes to show that plaintiff never had a cause of action against the defendant or any fact that minimizes the damages.

In the case of *Home Benefit Association* v. *Horne*, 280 S. W. 226, the defense of syphilis was attempted to be established solely by cross examination, as will be shown later in this brief.

It should be borne in mind that the defendant had not had the plaintiff examined by a physician prior to the trial and no blood test had been made by the defendant, hence the defendant was compelled to rely upon cross examination to establish *such defense* or any foundation therefor.

Judge Symes further said: "*Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on direct examination.*"

We respectfully take issue with that statement. The issue of syphilis was first injected into the case by defendant's cross examination of Imogene Johnson at pages 155, 156 and 157; the defendant's objection to a question asked Dr. St. Elmo Sanders on page 173, revealed defendant's contention, and defendant's cross examination of Dr. St. Elmo Sanders on pages 178 and 181 showed its purpose; *the first time that the word "syphilis" was mentioned at the trial was during the cross examination of Dr. St. Elmo Sanders by the defendant at page* 181; it was there that the defendant first suggested that even though the syphilis might not exist in an "active form" it could exist in a "luetic condition that is not active;" **the plaintiff up to this time had not in any manner mentioned the word "syphilis" or anything concerning it**; Dr. Sanders was then temporarily excused from the stand and Dr. Richman was put upon the stand and the defendant sought to prove by the cross examination of Dr. Richman that a Wassermann test that was taken, and which showed negative was unreliable and that even though the test showed

negative there could still be a luetic condition of syphilis (p. 184) and then counsel for defendant sought further to show that the test that was taken was wholly unreliable because it was a mere blood test, and that a competent physician should have taken "the test of the fluid in the spinal column" (R. 185) the Doctor answering, "The doctor, to be thorough, I believe should do that." The defendant then asked Dr. Richman:

> "Q. Yes. In other words, if he had a suspicion in his mind that the PLAINTIFF WAS SUFFERING FROM NEUROSYPHILIS, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he (R. 185)?"

Here is a definite attempt upon the part of the defendant to prove that the *plaintiff* was suffering from neurosyphilis (syphilis in the secondary stage) and that Dr. Sanders was negligent in merely taking a blood test and that he should have taken lumbar test.

Many other pages of the record show not only that the defendant injected the issue of syphilis into the case, but continued throughout the trial in an attempt to establish that defense. We, therefore, strongly take issue with the statement of Judge Symes that the defendant's interrogatories were but a continuation of similar questions propounded by the plaintiff.

Judge Symes said:

> "Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on direct examination."

The author of that sentence seems to indicate that if plaintiff showed affirmatively that she did not have syphilis that the defendant was thereby precluded from trying to prove that she did have syphilis.

Suppose plaintiff's counsel in an ordinary negligence case asked plaintiff if he was careful not to get hurt at the time of the accident, could not the defendant then on cross examination prove that plaintiff was contributorily negligent?

If it could be said that "defendant's interrogatories along this line were no more than a continuation of similar questions propounded on direct examination" then we ask, what was the purpose of defendant's interrogatories along this line, except to prove that plaintiff did have syphilis?

Suppose under this evidence the jury had returned a verdict for only $100 for a woman who is admittedly a hopeless paralytic, and the plaintiff had moved for a new trial on the ground of inadequate damages, would not the defendant have attempted to sustain the verdict by arguing that the jury must have found that the plaintiff had syphilis and that such disease was the cause of her permanent disability?

But notwithstanding these inaccuracies of statement and expression by Judge Symes, the Court of Appeals held that there was no reversible error, that is to say, the trial court did not abuse its discretion in the premises.

4. The argument complained of was proper; the record shows conclusively that the defendant attempted to prove "syphilis" as a defense even though it put no witness on the stand to prove it; defendant did not object to argument that defense was syphilis, but limited its objection to argument that syphilis could bar plaintiff from society and implied indecency; the exceptions were inadequate; the limits of argument were within the sound discretion of the trial court and there was no abuse of discretion; the argument was not prejudicial to defendant.

(a) *Plaintiff's knowledge that defense would be "syphilis."*

It is evident that the plaintiff's attorneys knew before the trial that the defendant would probably raise the defense of syphilis.

The record, page 191, shows that the plaintiff asked Dr. St. Elmo Sanders the following question:

> "Q. Now, Doctor, did some doctor representing himself as an agent of this railroad company come to you some weeks ago and talk to you about any syphilis trouble of this woman?"

That question was objected to and the answer excluded.

Mr. Chilcott, in his opening statement, page 91, to the jury said:

> "Now, gentlemen, we don't know what the defense in this case is going to be. We have heard rumors, but this girl was a strong, healthy, able-bodied girl before she was injured, etc."

Mr. Wickersham in his closing argument to the jury, page 426 said:

> "You note that Mr. Chilcott said in his opening statement, 'I only know from rumor what the

> defense in this case may be, but we will be able to meet it.' "

It is evident that we knew before the trial that the defendant was going to interpose the defense of syphilis. And it is also evident from the cross examination of practically every one of plaintiff's witnesses that the defendant was trying to prove syphilis. Should we have met that defense promptly upon re-direct examination, or should we have waited until the poison of such a defense had been injected into the minds of the jury and then have met such defense upon rebuttal? Our experience as trial lawyers teaches us that once the minds of the jurors are poisoned by such a defense, it is most difficult to meet such defense at the end of the case. Good trial practice required that such defense be met promptly by re-direct examination, and that is exactly what we did.

(b) *The defense was "syphilis."*

There are three stages of syphilis, "primary, secondary and tertiary" (330).

Defendant charged plaintiff had syphilis in the secondary stage, to-wit, *neurosyphilis*, that is the stage when the germ "*spirochaeta pallida*" "gets down into the nerves and tissues" (184); "secondary symptoms is the skin" (331).

The Standard work of White and Martin on "Genito Urinary and Venereal Diseases" (6th Ed. p. 854), says in discussing syphilitic eruptions of the skin:

> "Thus the syphilides (eruptions of the skin) of the first period of secondary syphilis are due

> to a local hyperaemia and slight cell-infiltrate, affecting only the epidermic and papillary layers of the skin and producing * * * *papular* lesions."

"Papular" is defined by Webster's International Dictionary as "having papules or *pimples.*" It also defines "*luetic*" as "Med. Specif. affected with syphilis."

White and Martin, *supra*, page 908, in discussing "*syphilis of the nervous system*" says:

> "Syphilis, then may attack the brain in the form of:
>
> "1. Diffuse *gummatous* infiltration of the *meninges*, with extension of the brain substance.
>
> "2. *Gummata*, or circumscribed tumors.
>
> "3. Endarteritis, with its concomitant brain-lesions."

And at page 916:

> "The *paralysis* that develops during sleep is probably due to a *thrombus;* that occurring during brain activity is probably caused by rupture."

And at page 617:

> "The treatment for cerebral syphilis is * * * a mixture of *potassium iodide and mercury.*"

And at page 617:

> "When rapid action of the specific is imperative, *hypodermic injections* of mercury are indicated."

And at page 905:

> "*Gummata* are formed with far less frequency in the cerebral tissue proper than in the bones of the skull, or in the *meninges* or the *subarachnoid space.*"

And at page 905:

> "It is extremely difficult to distinguish a large *tubercle* of the brain from *gumma*. The symptoms will be the same." (Italics ours.)

With the above quotations from a Standard work on syphilis we proceed to demonstrate that defendant attempted to prove that plaintiff was suffering from *neurosyphilis*, that is, syphilis in the secondary stage.

Mark the phrases: "*syphilis*," "*primary*," "*secondary*," "*tertiary*," "*neurosyphilis*," "*spirochaeta pallida*," "*secondary symptoms*," "*eruptions of the skin*," "*syphilides*," "*pimples*," "*lesions*," "*syphilis of the nervous system*," "*gummatous*," "*gumma*," "*paralysis*," "*thrombosis*," "*embolus*," "*meninges*," "*arachnoid*," "*hypodermic injections*," "*mercury*," "*iodide of potassium*," "*salivation*," "*lactic*," "*tubercle*," "*lumbar spinal puncture*," *hemiplegia*," etc.; all these words and phrases were used by defendant's counsel in a vigorous and persistent effort to establish the defense of syphilis.

The first witness on the stand was Imogene Johnson; the plaintiff did not ask her one single question concerning syphilis or anything relating to it; nevertheless the defendant immediately sought by cross examination to show syphilis by asking her if the plaintiff had "any eruption of the skin at all" (155) and "*don't it look a little bit as though it was a kind of a pimple and yet it wouldn't come to a head?*" (156) and "didn't she ever tell you whether they gave her *hypodermic injections?*" (157) (it will be noted that one of the symptoms of syphilis is an eruption of the skin during the first period

of secondary syphilis "producing papular lesions," that is, *pimples that do not come to a head*, and that "hypodermic injections" are recommended as a treatment for syphilis).

The next witness was Dr. St. Elmo Sanders. A careful reading of his direct examination will demonstrate that the plaintiff did not ask him anything concerning syphilis or the condition of plaintiff's blood; we put a hypothetical question to the doctor asking him whether the blow and violence indicated in the question could cause "the results to which you have testified" (167). Thereupon Mr. Marley objected to the question, saying among other things:

> "In other words to make my point clear, the evidence might indicate, by his examination and from his knowledge of it, that—and from the treatment he was giving of iodide of potassium—that there was another cause or condition in there that should be taken into consideration."

Bear in mind at that time only a portion of the hospital records had been put in evidence, including plaintiff's exhibit 4K, 175-176, which merely contained the words "Pot. Iodide, Sat. Sol. Physicians directions: Sig. gtts. V every 3 hrs. in full glass of water." Mr. Marley, anxious to lay a foundation for the syphilis defense, read that portion into the record, page 164. The plaintiff had not asked one single question concerning such treatment. It is evident that the above quoted objection of defendant was interposed for the purpose of showing that iodide of potassium was actually given for the treatment of syphilis. Toward the close of his direct examination the plaintiff asked the doctor:

"Q. * * * Now then doctor, in your opinion has all the improvement that is to take place, taken place?"

Thereupon the defendant objected to the question as follows:

"Mr. Marley: * * * I believe that his opinion should be based upon his exact examination of her, including any tests of the blood that he made, now. *There is a treatment here iodide of potassium* and all those elements ought to be taken into consideration in giving an opinion upon this point" (173).

Again defendant is attempting to inject this defense into the case. The record on page 178 of the cross examination of this doctor shows that defendant was attempting to show that the doctor did not prescribe iodide of potassium for the purpose of absorbing the clot or exudate on the brain caused by the blow, but was in fact prescribing that medicine to treat a syphilitic condition as will be shown later. Upon later cross examination of Dr. Sanders the defendant interrogated the doctor about Wassermann tests (p. 180) and brought out for the first time that tests are not only taken from the blood, but from "the spinal cord in the lumbar region" (180) and the defendant asked the doctor:

"Q. Isn't it very frequently the case that when you take a blood test from the arm that it might show negative when if you took it from the lumbar region of the spinal cord it would show positive?" (180).

Bear in mind that the hospital record concerning the blood test had not at that time been put in evidence and the plaintiff had not asked the doctor what the condition

of plaintiff's blood was. During this cross examination the defendant diligently sought to establish its contention that blood tests are inaccurate and that spinal puncture tests ought to have been made. Having secured from the doctor a statement that "sometimes you get a positive test from the lumbar region when the blood test shows negative," the defendant was "hot on the scent" and injected the word "syphilis" into the record for the first time by anybody. The doctor had said on cross-examination, page 181, that Wassermann tests in his opinion were reliable tests for certain things, and then the defendant asked:

> "Q. What are those certain things, Doctor?
> A. The test whether there is syphilis or not in an active form.
> Q. Whether or not there is syphilis in an active form; but supposing there is not in an active form, *a luetic condition that is not active*, then what?"

Here the defendant also brings out for the first time that a luetic or inactive condition of syphilis could exist and that with such luetic condition existing the proper thing for a doctor to do was to "go into the spinal column."

If the defendant was not trying to show that the plaintiff was suffering from syphilis what was the purpose of all these questions?

Dr. Sanders was excused from the stand and Dr. Richman was put upon the stand and after a brief direct examination was cross examined by the defendant, during which the defendant sought to show that Wasserman tests of the blood were unreliable (184) and defendant asked him:

"Q. In other words, it could show negatively when as a matter of fact there was a luetic condition?
A. It could be negative with a luetic condition, yes."

and

"Q. I know. Now, then, where you have a case that shows nervous symptoms you would take the test of the fluid in the spinal column, wouldn't you?
A. The doctor, to be thorough, I believe should do that.
Q. Yes. In other words, if he had a suspicion in his mind, that the PLAINTIFF was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?"

and

"Q. Yes, to make a thorough test as to neurosyphilis there should be a test taken of the spinal column, shouldn't there?"

When the defendant asked Dr. Richman if the doctor "had a suspicion in his mind that the *plaintiff was suffering from neurosyphilis*" he should take a lumbar test, the defendant was attempting to show that the plaintiff did have neurosyphilis. That was the first time "neurosyphilis" had been used in the trial. If the defendant was not trying to show that the plaintiff was suffering from neurosyphilis, why was the defendant contending that the blood test was unreliable and that a lumbar test should have been made? Why was the defendant suggesting that a lumbar test of the PLAINTIFF should have been made?

In the cross examination of the next witness, Dr. Rahr, defendant again claimed a lumbar test should have been made and asked the doctor:

"Q. Doesn't that—Haven't you found that that would sometimes report positive when the blood test would report negative?" (188).

Dr. Sanders was recalled to the stand and when the plaintiff asked him to differentiate the plaintiff's manner of walking from locomotor ataxia. The defendant objected, saying:

"Mr. Marley: If the court please, I don't believe there is a question of locomotor ataxia in this case at all, *so far as the evidence is concerned so far*, and I object to going into it.

"Mr. Wickersham: If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question.

"Mr. Marley: I am saying now there was nothing said about locomotor ataxia, *and he is going into something that isn't within the range of the testimony as developed at this time;* and we object to it as incompetent; too remote.

"The Court: Objection sustained.

"Mr. Wickersham: The idea was, Your Honor, that this evidence about the blood test—*I wanted to go into it if there is any question about it.* That is all. You may examine" (192).

It will be noted that Mr. Marley merely objected to a discussion of locomotor ataxia because that "isn't within the range of the testimony at this time" (192). In other words he was claiming that the plaintiff was suffering from neurosyphilis, syphilis in the secondary stage, locomotor ataxia being a development of the tertiary stage.

In the cross examination of Dr. Chaney, page 205, the defendant objected to the doctor testifying as to his reading of certain X ray plates which showed a

thickening that caused a pressure upon the brain, resulting from the injury, "because it would embody any mistakes they made in the diagnosis of her case" (205). Again the defendant was contending that the diagnosis "*edema of the brain resulting from injury*" was wrong and that the plaintiff was suffering from neurosyphilis and not from traumatism.

During the cross examination of the plaintiff, Myrtle Johnson, page 282, defendant tried to get the plaintiff to admit that the serum that was injected into her arm by Dr. Geraughty was "salvarsan" (a treatment for syphilis), and again at page 285 counsel tried to bring out that the internal medicine administered was "bismuth," and at page 286 that "hypodermic injections" were administered.

On the direct examination of Dr. Geraughty, the doctor was asked:

> "Q. You spoke about bony condition; what did you mean by that?
> A. In syphilis, the bones of the body seem to be affected very prominently, pains in the bone, especially in the shin bone. It has been very characteristic in the chronic cases."

Thereupon the defendant objected:

> "Mr. Marley: We object to that because there is *no evidence of a chronic case*.
> "Mr. Wickersham: Let the record show that he doesn't claim that.
> "Mr. Marley: The chronic case would be in the tertiary state" (323-324).

The plaintiff was here attempting to show that syphilis did not exist in any stage, either first, second

or third, and it is evident from reading the defendant's objection that the defendant was admitting that plaintiff did not have syphilis in the tertiary stage, but was still contending that the syphilis existed in the secondary stage, to-wit, neurosyphilis.

That defendant was claiming that the plaintiff was suffering from syphilis in the secondary stage is clearly evident from the defendant's cross examination of Dr. Geraughty:

> "Q. When a patient is given iodide potassium, so many drops every few hours, what is that ordinarily for, what kind of a disease? (Remember that at page 164 the defendant had read into the record the fact that Dr. Sanders had prescribed 5 drops of potassium iodide every three hours).
> A. We use that, it is one of the major drugs in the treatment of syphilis.
> Q. And before they discovered the salvarsan, it is or was the principal medicine in the treatment of syphilis?
> A. Yes, sir, very prominent, and still is" (329).

and

> "Q. There are three stages of syphilis, are they not?
> A. Generally considered.
> Q. Called the primary, secondary and tertiary?
> A. Yes, sir."

and

> "Q. And very frequently ladies may acquire it by drinking out of cups, or kissing people that might have a *chancre* on the lips?
> A. Yes, sir.
> Q. And it is very common to acquire it that way?
> A. I wouldn't say common.
> Q. But frequent?
> A. Yes, sir; frequent.

Q. And many a woman goes along suffering from syphilis and knows nothing about it?
A. Men also, yes, sir." (330).

Here is an adroit attempt on the part of the defendant to induce the jury to believe that the plaintiff was suffering from neurosyphilis and acquired that disease innocently without immorality.

And

"A. As a rule the secondary state, secondary symptoms is the skin.
Q. This germ is what is called *spirochaeta?*
A. Yes, sir.
Q. *Spirochaeta pallida?* That is the full name. The first test they use is what is called the Wassermann test of the blood to find out that condition?
A. Yes, sir, Wassermann test is used.
Q. After it goes beyond that stage, and gets into the stage of neurosyphilis, the blood test is not accurate?
A. The blood test is not absolutely accurate in any stage of it.
Q. Now, however, where there is neurosyphilis, to make a sure test of it, don't they generally make a test of the fluid of the spinal cord taken from the lumbar region" (331)?

And

"Q. Now, taking up the question of lesions in what is called neurosyphilis, doctor, doesn't it form along in the tissue and along the nerves what is called *gummatous formations?*
A. Yes, sir.
Q. And they are *tubercules*, are they?
A. Yes, sir.
Q. And they press on the nerve, the tissue that is next to it?
A. Yes, sir.

Q. And it keeps on increasing until it presses down and *paralysis* is the result, isn't that right?
A. Yes, sir.
Q. It is generally between, it is along the *arachnoid* membrane?
A. Yes, sir.
Q. And that is between the dura mater and the pia mater?
A. Yes, sir.
Q. And it also gets in the *meninges?*
A. Yes, sir.
Q. That is what covers the brain the spinal cord and everything?
A. Yes, sir; outside coating.
Q. *After that is done, doesn't it begin to form there so as to paralyze one side of the body and by pressure cause what you call occlusion?*
A. Yes, sir.
Q. And presses down, and isn't there a formation what you doctors call there a *thrombosis* formation?
A. I wouldn't say *thrombosis* in that case; it is a foreign body carried around and deposited in the end of an artery. *Thrombosis* is the blocking of any foreign substance in the blood.
Q. Isn't that *embolus?*
A. Both very close together. *Thrombosis* is an *embolus* that has stopped" (332-333).

And,

"Q. **Now isn't it a fact, Dr. Geraughty, that in neurosyphilis, it is slow and insiduous, it is true, but it sometimes reaches a state that even a slight shock will bring on the paraletic stroke, hemiplegia, as you call it?**
A. Yes occasionally. Occasionally a case can come quick under those circumstances" (335-336).

Here is a definite proof that the defendant was attempting to make it plain to the jury that the plaintiff had neurosyphilis; that she had acquired the disease

innocently without immorality; that the Wassermann test which was made was wholly unreliable, and that a lumbar test should have been made, and that the plaintiff having neurosyphilis, and not knowing it, the "slight shock" which she received at the time of the accident brought on the paralysis. If that was not the purpose of the defendant in eliciting this testimony, then what purpose had the defendant in mind?

Immediately after this cross examination of Dr. Geraughty the plaintiff asked the doctor on re-direct examination the following question concerning a "slight shock" causing paralysis so far as the plaintiff was concerned:

> "Q. Explain that situation as far as the evidence in this case is concerned?
> A. The evidence in this case, of course, points away from that. Had this patient shown symptoms and given other evidence of have had an old syphilis and then had an injury, then it is possible that a quick paralysis might have occurred with previous history, if the patient had been worked up to the point where—could have been worked up to that point, but with the history showing the traumatic condition, the evidence points to traumatic hemiplegia rather than neurosyphilis.
> **Q. And if she had had such a neurosyphilis as counsel indicates, it would have been natural and reasonable that you would have had some evidence of it from the glands?**
> A. Yes.
> Q. Some evidence from the bones?
> A. Yes, in a general way; some evidence of syphilis would have been present, of course, the neurosyphilis is a type of syphilis which includes the nerves of the central nervous system.
> Q. And if there was anything, any neurosyphilis that was the cause of the paralysis coming into

quick action from the blow, would you have any reflex in the woman today?

A. We would have a slow reflex.

Q. And the fact is she—the fact that she had exaggerated reflex there today be any evidence—

Mr. Marley: Object to leading the witness.

The Court: That has all been gone over" (336).

The question "**and if she had had such a neurosyphilis as counsel indicates**" is a positive declaration to counsel, court and jury that defendant was claiming plaintiff, before the accident, had neurosyphilis; yet defendant's counsel hearing that question acquiesced in it and made no denial that such was the defense, and did not interrogate the doctor further.

When plaintiff's counsel openly stated in substance in that question that the defendant was claiming that plaintiff had neurosyphilis, it was defendant's counsel's duty then and there to have denied such charge if the defense was not syphilis. Fairness to plaintiff, court and jury, then demanded that defendant's counsel deny such charge if it was not true. *Defendant ought not to be allowed to sit mute under such a situation and get all the benefit that might come in the form of a favorable verdict from such a defense and then if the verdict is against it assign such a charge as error. There is no justice in that.*

But defendant did not quit its attempt to prove neurosyphilis after Dr. Geraughty left the stand, but continued. It asked Dr. Hines on cross examination:

"Q. Doctor did she tell you that she had a Wassermann test and that it showed positive?

A. No, sir" (338).

The defendant inquired of Dr. Mella if he had made any examination of the blood condition (339).

In the cross examination of Dr. Krall defendant asked:

> "Q. Didn't she tell you they were positive?
> A. No, sir. She said they were negative" (356).

And,

> "Q. Did you give her any bismuth at all?
> A. At no time" (357).

Let us analyze for a moment that portion of defendant counsel's closing argument where he says:

> "Now, gentlemen of the jury, you never heard me say a word about any specific trouble whatever. I said nervous exhaustion, didn't I? Now I want to say to you now that I don't think she ever had a specific trouble at all, and I never said she did have" (420).

Let us take the first two sentences. Are they true? If counsel is there referring to defendant's opening statement, the two sentences are true, but when applied to the examination of witnesses the sentences are not true, because counsel during the entire case diligently and relentlessly tried to prove plaintiff had a specific trouble, to-wit, neurosyphilis.

Now take the second sentence:

"I said nervous exhaustion, didn't I?"

What did counsel for defendant mean by "nervous exhaustion." "Nervous exhaustion" has two meanings. To the layman it probably means a "run-down" nervous condition, an exhausted or lowered nerve tone,

a tired nervous condition; to the doctor the term implies a definite disease; to the doctor it is a technical medical term known as Beard's Disease.

First let us assume that counsel for the defendant used the term "nervous exhaustion" as generally understood by laymen. If the defendant should claim that "nervous exhaustion" was intended to mean mere nervousness or a lowered tone of the nervous system, then we ask how could such lowered tone or "run-down" nervous condition put the syphilitic germ into the blood? If that is what defendant meant, why did defendant so strenuously insist that Wassermann tests were unreliable and that spinal puncture tests should have been taken? Why did defendant prove that syphilis may be contracted without immorality? Why did defendant prove that even though a Wassermann test showed negative yet a luetic condition of syphilis could be present? Why did defendant prove that if a person is suffering from neurosyphilis a "slight shock" might cause paralysis? Why all this proof, and much more, if defendant was not charging that plaintiff had syphilis?

"Nervous exhaustion" is a result and symptom of syphilis in the secondary stage—exactly the stage charged by the defendant.

Now let us consider the other meaning of the term. Throughout the trial defendant's counsel employed many technical medical terms and showed a profound knowledge of neurosyphilis and its symptoms and causes. He used so many technical terms it is fair to assume that he knew "nervous exhaustion" was a technical medical term.

"Nervous exhaustion" is commonly known as "Beard's Disease." Dana in his standard work "Text Book of Nervous Diseases and Psychiatry" 7th Ed. Ch. XXIV, page 577, in discussing "nervous exhaustion, Beard's Disease" says:

> "It may also be induced by the infection of syphilis. It then comes on in the secondary or less often in the tertiary stage."

"Nervous exhaustion" does not cause neurosyphilis. The germ "spirochaeta pallida" causes neurosyphilis when the germ "gets down into the nerves and tissues" and that causes "nervous exhaustion." NERVOUS EXHAUSTION IS BUT A SYMPTOM OF SYPHILIS. When defendant said that the plaintiff was suffering from "nervous exhaustion" it meant that kind of nervous exhaustion that was caused by syphilis. Thus we see that the use of the term "nervous exhaustion" was a studied adroit attempt to "sugar-coat" the poisonous pill of syphilis.

But in order to measure the sincerity, or lack of it, shown by defendant's counsel in using that sentence, we must read the next paragraph of his argument.

> "* * * The day following he (Dr. St. Elmo Sanders) had a Wassermann test made and commenced to give her iodide of potassium. He had a positive diagnosis of it too, gentlemen. We know and the evidence of these physicians medical men, show that iodide of potassium was the old remedy for a specific trouble; and right on there was a Wassermann test. That suggested to me that the doctor had made a wrong diagnosis of the case" (420).

Now what does that mean? It means that the defendant claims that the evidence shows that plain-

tiff had syphilis. That is exactly what it means and nothing else. The defendant there charges that the doctor "had a *positive* diagnosis" when he took the Wassermann test, not a negative one, and getting a *positive* was why he administered iodide of potassium. Here is a bold charge that Dr. Sanders' hospital record was false and that the doctor actually found syphilis, else he would not have given her iodide of potassium.

The doctor diagnosed the case as "odema of the brain resulting from injury." The defendant said in substance: "That diagnosis was wrong, she did not have 'odema of the brain resulting from injury'; she had syphilis; and we charge that she had syphilis because the doctor gave her iodide of potassium which the world knows is a treatment for syphilis, and the doctor took a Wassermann test which everybody knows is taken to determine syphilis; the doctor had a *positive* diagnosis, not a negative one, that is why he gave her iodide of potassium to treat the syphilis."

The defendant's counsel was blowing hot and cold; in one breath he says she hasn't a "specific trouble" and in the next breath he says the plaintiff has syphilis, but adroitly avoids the use of that particular word.

It must be remembered that plaintiff was injured on September 27, 1925, and that Dr. Geraughty did not see her until "the early part of March, 1926" (p. 316) and that *plaintiff was a paralytic six months before Dr. Geraughty treated her.* Surely nothing that Dr. Geraughty did could have made her a paralytic before he saw her. The fact is that counsel for defendant's argument about Dr. Geraughty's treatment is an

eleventh hour attempt to avoid or minimize the effect of his ill-considered attempt to charge that plaintiff had neurosyphilis. And the use of the word "neurosyphilis" is another evidence of defendant's cunning. "Neurosyphilis" is syphilis in the second degree, "when it gets down into the nerves." Syphilis is syphilis whether it be in the first, second or third stage and no long Latin word makes the disease any the less terrible, nor does such a word in any manner excuse the defendant from falsely charging a pure woman with having such a loathesome disease.

(c) **The objections and exceptions to the argument of plaintiff's counsel were indefinite and insufficient. The defendant did not object to the argument that the defense was "syphilis," but its objection was limited to any argument that defendant was charging plaintiff with indecency.**

What was the objection taken by defendant to the argument of plaintiff's counsel about syphilis? These objections appear on pages 412 and 427 of the record. In Mr. Chilcott's argument (402) he said:

> "But, gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.
>
> "Mr. Marley: I object to that, your honor. There is no evidence of that at all. It isn't proper argument.
>
> "*The Court: The objection is overruled, in view of the examination of the witnesses and of the testimony in the case.*"

Now what did Mr. Marley mean when he said "There is no evidence of that at all." Evidence of

what? Did he mean to say that syphilis was not a defense and, hence, the argument was improper, or did he mean to say that there was no evidence that "syphilis would bar that girl from society?" In order to understand just what that objection meant, it is necessary to see what objection Mr. Marley made to Mr. Wickersham's closing argument. On pages 426-427 Mr. Wickersham said:

> "Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman—
>
> "**Mr. Marley: If Your Honor please, there is no evidence of that kind, or any attempt on our part—**
>
> "Mr. Wickersham: I say there is.
>
> "**Mr. Marley: —to charge her with indecency, and I take exception to the argument of counsel along those lines.**
>
> "The Court: The gentlemen of the jury will recall what the testimony has been. Counsel may argue the testimony as they recall it and draw inferences from the testimony which they think may be drawn.
>
> . . . . . .
>
> But you must depend upon the testimony of the case for your decision."

Plaintiff's counsel did not say that defendant charged plaintiff with indecency.

It will be noted that Mr. Marley does not say that the defense is not syphilis; nowhere does he disclaim that syphilis is a defense; all that he then claimed was that the defendant was not attempting "to charge her with indecency." And he follows that with the state-

ment "And I take exception to the argument of counsel along those lines," to-wit, along the lines of indecency. Remember that defendant in the cross examination of Dr. Geraughty (p. 330) had brought out the fact that "very frequently ladies may acquire it (syphilis) by drinking out of cups, or kissing people that might have a *chancre* on their lips," that is to say, may acquire syphilis innocently and without immorality or indecency.

There was not a single thing in defendant's objection that apprized the trial court that defendant was not contending, and had not been contending, that the plaintiff had the syphilis.

If the plaintiff had the syphilis, was she "indecent" in any sense of the term? That we will discuss later.

It is fundamental law that an objection to a court's ruling and an objection to the court's charge must be definite and specific to be availing to predicate error.

> "An assignment of error is bad if it is necessary to look beyond its terms to the brief for a specific statement of the question sought to be presented." Zoline's Fed. App. Jurisdiction & Procedure, page 217, Sec. 226.

In *United States* v. *Hammond*, 226 Fed. 849, the court said:

> "In the District Courts, an exception to a charge, in order to entitle a party to have it entertained on motion for new trial, must be sufficiently distinct and specific to direct the attention of the court to the particular vice or error complained of, so that the court may see whether

> the objection is well-founded, and have an opportunity, before the jury retires, to correct any error."

In *Beiseker, et al., v. Moore*, 174 Fed. 368, (Eighth Circuit), Judge Adams said:

> "* * * **It is the duty of counsel to direct the attention of the court to the precise point of objection.**"

In *A. T. & S. F. Ry. Co. v. Nichols*, 2 Fed. (2d) 12, Judge Hunt uses (but does not quote) the following language of Mr. Justice Pitney in *United States v. U. S. F. & G. Co.*, 236 U. S. 696, as follows:

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed he has erred in law, so that he may reconsider it, and change his ruling if convinced of error, and that injustice and mistrial due to inadvertent error may thus be obviated. *An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court*" (Citing many cases) (Italics ours).

We submit that the objection and exception taken by the defendant to the above quoted argument was specifically limited to the matter of "decency" when Mr. Marley said: "If, Your Honor, please, there is no evidence of that kind, of any attempt on our part * * * to charge her with indecency and I take exception to the argument of counsel along those lines." The objection was limited to that and that alone. It was not an objection to our argument that the defense was syphilis.

(d) *To falsely charge that a woman has syphilis is libelous or slanderous per se.*

Dunglison's Medical Dictionary says that while the etymology of the word "syphilis" is unknown; that it is very probably derived from the Greek word "*siphlos*" —formed, by a contraction from "*sipalos*"—meaning "*a reproach.*" It is a "chronic, specific, contagious venereal disease."

Odgers, in his work on Libel and Slander (4th Ed.) 1905, page 48, Sec. 2, says:

> "Words imputed to the plaintiff that he has an infectious or contagious disease, are actionable without proof of specific damage. *For the effect of such imputation is naturally to exclude the plaintiff from society.* Such disease may be either leprosy, venereal disease, or it seems the plague * * *. Any words which hearers would naturally understand as conveying the meaning that the plaintiff then has such a disease are sufficient."

Newell on Libel and Slander (3rd Ed.) 1914, page 240, says:

> "Defamatory words falsely spoken, of a person which imputed that the party is infected with some contagious disease, where, if the charge is true, *it would exclude the party from society*, are actionable within themselves without proof of specific damages."

The Court in *Goldeman* v. *Stearns*, 7 Gray (Mass.) 181 says:

> "The charge against a person of his having a venereal disease is held to be actionable * * *, *not because the charge imputes any legal or moral offense, but solely because it tends to exclude him*

*from society as a person having a disgusting and contagious disease * * * and with whom it is unsafe to associate.*"

36 C. J. page 1167 says:

> "The general rule is that to charge one orally with a disease which would *wholly or partially exclude him from society* is actionable *per se*. * * * This principle has been applied to venereal disorders." Citing *King* v. *Pillsbury*, 115 Me. 528; *Simpson* v. *Press Pub. Co.*, 67 N. Y. S. 401; *Watson* v. *McCarthy*, 2 Ga. 57; *McDonald* v. *Nugent*, 122 Iowa 651, and others (all above italics ours).

Syphilis is defined by Webster as "a chronic, specific, contagious venereal disease." It is loathesome—something to be shunned. A woman is not considered "decent" who is known to have the dreadful disease. Any railroad company defending an honest claim against it for damages that openly or covertly charges or insinuates that a pure and innocent woman has such a loathesome, dreadful, contagious venereal disease, deserves the condemnation of every man that honors womanhood, and a lawyer who represents such a good woman thus basely maligned who would not on her behalf expose and condemn such assailant is unworthy to practice law. No court will ever take from such a woman a just judgment because her lawyer exposed such a contemptible defense.

(c) *The control of argument by counsel rests in the sound discretion of the trial court.*

As applied to the simple issue presented in this case, we understand the law to be that counsel in argument to the jury may not:

1. Go outside the record, except he may comment upon pertinent matters of common knowledge.

2. State facts of his own knowledge, and thus testify.

3. Use obscene or improper language.

4. State erroneous propositions of law governing the case.

5. Unduly appeal to local, racial, financial, corporate or religious prejudices.

But counsel may:

1. Discuss any fact in evidence and draw inferences therefrom.

2. Discuss matters of common knowledge that are pertinent to the evidence or issues.

3. Discuss any issue to be submitted under the pleadings and the evidence.

4. In discussing any fact in evidence or any defense raised by the pleadings or the evidence resort to so-called "oratory" or declamation, and vigorously comment upon any defense interposed so long as he keeps within the record and does not use language unbecoming an officer of the court.

The control of argument by counsel rests in the sound discretion of the trial court, because:

The Trial Court

1. Sees and hears the witnesses.

2. Sees and hears counsel, observes their manner, actions, voice, intonation and understands the effect of their efforts.

3. Sees the jury, and knows the class and kind of men composing the jury.

4. During the trial often confers with counsel out of the hearing of the jury and such conferences are often not incorporated in the record.

5. Knows whether assistant attorneys, claim attorneys or claim agents sit at the counsel table and actively aid counsel trying the case, although they may not be listed as attorneys in the case.

6. Sees and observes the effect upon the jury of argument by counsel.

When the defendant offered an objection to the argument of plaintiff's counsel it was defendant counsel's duty to make the objection plain and specific, and thus definitely advise the court as to exactly what was claimed to be objectionable and why.

If the objection is double in that it covers two subjects, one of which is objectionable and the other not, then the objection is bad and unavailing. The objector has only himself to blame under such circumstances.

The defendant's objection to Mr. Chilcott's argument was cryptic or double. Mr. Chilcott said: (a) the defense was syphilis, and (b) syphilis would bar plaintiff from society. The objection was "there is no evidence as to that at all." Did the defendant object because there was no evidence that the defense was syphilis, or did defendant object because there was no evidence that syphilis would bar plaintiff from society?

The court said: "The objection is overruled, in view of the examination of the witnesses, and of the testimony in the case."

That defendant was not objecting to our argument that the defense was "syphilis" but was only objecting to our charge that syphilis would bar her from society, see argument, *supra*, point 4 d.

In the case of *Grand Trunk Ry. Co. v. Blau*, 207 Fed. 635, the plaintiff in error claimed that counsel for

the defendant in error made an improper statement in the presence of the jury concerning an absent witness, to-wit: "That confirms my theory that the Grand Trunk Railway Company have got her." Counsel for plaintiff in error then said: "I desire an exception to that remark." The Circuit Court of Appeals in passing upon this matter said:

> **"Counsel for the plaintiff in error did not ask for an instruction to correct the impropriety of this remark. He did not request that the jury be cautioned to be uninfluenced by it, or that they disregard the remark. To make available the impropriety of this remark as an error at the trial, it was incumbent upon counsel for the plaintiff in error to ask for some instruction to the jury to disregard the remark, or be uninfluenced thereby. A mere exception to the remark was insufficient."**

In the case of *Plunnett* v. *McFall*, 284 S. W. 850, the court said:

> "Suffice it to say, it is largely for the trial court to determine whether counsel, in the conduct of a case and in argument to the jury, transcend the limits of professional duty and propriety, and unless there has been a clear abuse of such discretionary power, it is not within the province of an appellate court to interfere."

The defendant does not contend that the verdicts for plaintiffs are excessive, indeed, such question could not be raised under a writ of error. The fact that the defendant did not make a motion for new trial upon this ground is impelling proof that the verdicts are not excessive even in the opinion of the defendant.

The court in the case of *Brady* v. *Traction Co.*, 140 Mo. App. 421, said in discussing the argument of counsel which they held improper, said:

> "We conclude that the only proper verdict that could have been rendered was a verdict for plaintiff, and that the damages assessed, * * * are not excessive, and we therefore, have reached the conclusion in this case, that the remarks of the counsel for plaintiff, improper as they were, did not effect the result."

In the case of *Remus* v. *U. S.*, 291 Fed. 501, the court said:

> "Though arguments by a district attorney calculated to inflame jurors and prejudice them against accused are not regarded with favor, the district attorney has the right, and it is his duty, so long as he confines his argument to the evidence, to present the government's side of the case in forcible and direct language."

In the case of *Ostertag* v. *Railroad*, 261 Mo. 457, the court said:

> "There was no error in plaintiff's counsel in his argument to the jury calling defendant's claim agent a ghoul, when speaking of his having visited the hospital and obtained a statement from plaintiff two days after the accident in which the plaintiff had lost a leg."
>
> "Permitting counsel to state to the jury, in an action for charging a girl with fornication, that one guilty of making such charge is not fit to live in the county is not reversible error." *Miller* v. *Nuckolls*, 77 Ark. 64, 91 S. W. 759; 4 L. R. A. (N. S.) 149.

In *Morrill* v. *Palmer*, 68 Vt. 1, 33 L. R. A. 411, plaintiff's counsel in his argument to the jury said:

> "The sister, whited sepulcher, caused this trouble."

Defendant claimed there was "no evidence of that fact." The court held it was a legitimate inference plaintiff might draw and said:

> "It would bring the jury system into great disrepute, and be a reproach to our jurisprudence, if we reversed judgments for such remarks of counsel in commenting on testimony" (Judge Taft).

In *Home Benefit Association* v. *Horne*, 290 S. W. 226, plaintiff sued on accident policy for loss of an eye. On *cross examination* of plaintiff defendant brought out that,

> "in 1916 he was examined by a doctor in Fort Worth, and they (defendants) attempted to show by appellee (plaintiff) that said doctor informed him that he was suffering with said disease (syphilis)."

They also on *cross examination* showed:

> "That he had on several different occasions after 1916 been examined by other doctors and attempted to show that each of them had pronounced him suffering with the same disease."

The Appellate Court said:

> "Appellants complain of the following argument of counsel in his closing speech to the jury: 'I feel doubly responsible in this case, not only because of the amount involved that this man is suing for and which he needs, but I feel responsible because he charged this man with having an infamous disease, calculated in most families to cause unhappiness.' • • •

> "The record further shows that the only defense made by appellants to the claim was that appellee had suffered the loss of his eye, by reason of the disease, *and of course the jury knew it was an infamous disease.*"

(f) *After the arguments and before the case was submitted to the jury the Court twice asked the defendant if it desired any additional instructions to the jury and the defendant did not request any instruction on this ground.*

After the arguments and the instructions by the Court, the Court asked if plaintiff desired to except or to request additional instructions and plaintiff's counsel said: "No, sir," and then the Court said:

> "Does the defendant desire to request additional instructions or to except to those given by the Court?" (443).

If the defendant then thought that the defense it was making had been misrepresented by the plaintiff or that its interests had suffered by the argument, or that the jury might be prejudiced by anything that had been said during the argument, here was an invitation by the Court to the defendant to offer any request for an instruction on such subject. If the defendant actually was not defending on the ground of syphilis and it honestly felt aggrieved by plaintiff's argument, and it wanted the jury to know definitely its position as to that matter, and it did not want the jury to have any wrong idea about such defense, and thus have any possible prejudice eliminated, here was an opportunity for the defendant to have asked the Court to instruct the jury accordingly. But no, the defendant did not

do that. The truth is that this matter of argument was a matter of little or no moment in this defendant's mind at that time. The defendant, however, called to the Court's attention a number of matters it considered of importance. It requested the Court to charge the jury concerning the relationship of witnesses to the plaintiff, which the Court promptly did; it excepted to a long instruction about the care required of defendant; then it excepted to the charge as to burden of proof and the Court's modification thereof, and then as to the measure of damages for Edward H. Johnson, the husband, etc., etc., and when the defendant had concluded, the Court again asked defendant: "Had you some other exception?" (454) and counsel merely added that he desired separate exceptions in the two cases. And when this had been done the Court said:

> "Gentlemen, may I conclude by thanking you for your careful attention to the case, and by thanking the attorneys on both sides for the lawyer-like and gentlemanly manner in which the case has been tried."

Can any appellate judge read and know what happened at the trial of this case and come to any conclusion other than that the defendant here is trying to make a mountain out of a mole hill? The fact that the defendant did not, when the argument was objected to, frankly state that syphilis was not one of its defenses, when the Court and plaintiff both believed that it was, and the fact that the defendant wholly failed to request any instruction thereon, ought to weigh heavily with this Court.

Moreover, the fact that defendant did not make any motion for a new trial, but went to the Court of Appeals on a writ of error, under which the amount of the verdict could not be assailed, ought also to weigh heavily with this Court.

(g) *Plaintiff's argument to the jury was not prejudicial to defendant.*

In the case of *I. & G. N. Ry. Co.* v. *Erwin*, 64 Tex. 535, the Court said:

> "The use of improper language or course of argument by adverse counsel, within itself furnishes no sufficient reason for reversing a judgment; and it is only in cases in which the preponderance of the evidence seems to be against the verdict, or in cases in which the verdict seems excessive and there is reason to believe that the verdict may have been affected by such course of conduct, that it then becomes ground for reversal."

Let us assume for the sake of this discussion that plaintiff's argument was in some manner objectionable. With that premise let us see whether it could possibly have had any influence upon the verdict. It is claimed that influence could be exerted either upon the issue of negligence or the amount of the verdict.

As to the issue of negligence, could the argument reasonably be said to have influenced the jury to return a verdict for plaintiff? A brief analysis readily disproves such charge. The plaintiff's evidence as to how the accident occurred was affirmative evidence; the defendant's evidence was purely negative. The plaintiff's evidence as to how the accident happened consisted of the testimony of the plaintiff and her sister-in-law, Imogene Johnson. Judge Symes in his opinion said:

"The plaintiff and her sister-in-law gave a most graphic description of the accident" (469).

Was that graphic description true? If it was true and the jury believed these two women, then the argument in question could not possibly have influenced the jury in determining whether there was negligence, and as to whether the testimony of these two women is true, we need only listen to the closing argument of defendant's counsel, Mr. Marley, to-wit:

"Now, we have here two young ladies. I will say to you I have known Imogene ever since she was a girl. I knew her mother, and a grander woman than her mother never lived, so you see I know the situation of her and I know her desire to tell the truth, and I believe Myrtle's desire was the same" (422).

Moreover, counsel in his argument immediately following the above statement said:

"But all of a sudden there was a check of the car, and it pitched her forward. Now, what was the effect? She had her right hand on this and it pitched her forward. The tendency is just like the cracking of a whip. When it pitched her forward, it would throw her face forward towards the upper berth and then to the side. Now then, it pitched Imogene over, and of course she knew nothing of what happened only that she picked Myrtle up off the floor. Now that is the situation there" (422).

Moreover, counsel for the defendant in his opening statement, page 94, said:

"* * * The plaintiff's wife was undertaking to open her grip to get something out of it when there was a lurch of the train, and as we understand her head was struck against the upper berth."

Here is an unusual situation; the defendant in his opening statement admitted that there was a lurch of the train that threw the plaintiff's head against the upper berth (94); he admitted in his closing argument that he "had known Imogene ever since she was a girl and, I know her desire to tell the truth and I believe Myrtle's desire was the same" (422-418); *counsel for the defendant frankly admitted before the jury that these two women told the truth;* then he again admits that there was "a check of the car and it pitched her forward" (422). Now if these two young women told the truth, and defendant admits that they told the truth, how can it reasonably be said that the jury could possibly have been misled on the issue of negligence? Especially is this true when we consider the evidence offered by the defendant as to the operation of the train.

The first witness called by defendant on this subject was Kates, the negro porter of the Club car, a number of cars ahead of the car in which plaintiff was riding. He merely stated that he did not recall any unusual jerk of the train. He did not testify where he was at the time of the accident.

The next witness was Emmy Mathews, a negro maid, who testified that there wasn't any jerk of the cars that night, although she does not say where she was on the train at the time of the accident; but this negress was thoroughly discredited and impeached because she testified that the morning after the accident she had a conversation with the plaintiff Myrtle Johnson (375) when as a matter of fact, Myrtle's tongue was so paralyzed she could not talk. This negress also testi-

fied that she thought "drinking lemonade might paralyze a person" (376). Her testimony was utterly worthless.

Martin Kane, the train conductor, was the next witness, who testified that he did not remember any unusual jerk or jar, but that the first time he ever knew anything about this accident was when the claim department called his attention to it "a couple of months at least after the accident." His testimony was thoroughly discredited because the conductor of the train, to-wit, Kane, wired ahead for a doctor for the plaintiff the morning after the accident.

The rear brakeman, McCormick, testified that he didn't remember anything about any jerk of the car, nor did he know anything about the accident, even after it occurred. His cross examination on pages 381-82 completely discredited him.

The passenger brakeman, Connors, testified that he didn't remember any unusual jerk of the car, but his testimony was worthless because he admitted that the first time that his attention had been called to the case was when "he was ordered to go to the claim department in Buffalo" (384-5) and he could not remember what year it was he was ordered there; he never even heard about the plaintiff being injured. His testimony amounted to nothing.

Walter Vernon, the Pullman conductor, was not even asked by defendant's counsel if he felt or observed any unusual lurch or movement of the train. This witness was likewise thoroughly discredited because he claimed that he talked with Myrtle Johnson the day following the accident (389) when it was definitely established that her tongue was so paralyzed that she could not talk.

He was also discredited because he testified that the first time any claim agent or lawyer for the Railroad had ever discussed his evidence with him was when he took the stand (396), notwithstanding the fact that he came all the way from New York to Kansas City for that purpose.

The above were the only witnesses for the defendant who were on that train, and one of them said that the plaintiff claimed that she stumbled over a grip, and another one said that the plaintiff claimed that she bumped her head while getting over her sister in the berth, both stories being positively untrue. These two witnesses were discredited by defendant's own counsel who admitted in his closing argument that Myrtle and Imogene both told the truth. In other words, there was no explanation whatever offered to rebut the positive proof of the plaintiff. Moreover, *the defendant failed to put upon the stand the engineer or the fireman* of this particular train and the nurse who attended the plaintiff and *also failed to produce any passenger on that train* notwithstanding the fact that the reservation cards containing the names of all passengers were under the control of the defendant.

We realize that an appellate court might take the position that if an argument on its face was more or less improper that the conclusion might well be formed, that such improper argument had an effect upon the jury in its verdict, but we submit that an examination of the negative testimony of Kates, Mathews, Kane, McCormick, Connors and Vernon, will show that the argument in question could not possibly have caused the jury to

believe all or any one of them as against the positive testimony of Myrtle Johnson and Imogene Johnson whose testimony was vouched for by defendant's counsel as true.

Now as to the amount of the verdict. Did the argument complained of substantially or in any manner effect the size of the verdict? It is true that the verdict was for the full amount demanded and that fact ordinarily would cause an appellate court to scrutinize the matter of argument closely, but such scrutiny will reveal the following:

1. The defendant in its closing argument said:

> "Now they put on 21 witnesses, that is true, but what were those witnesses testifying to? To the condition of this poor woman. They were merely testifying to the condition. You didn't need those witnesses to tell you her condition. You could tell it by looking at her on the stand. You gentlemen have intelligence, you have eyes, and you have understanding and you have the ordinary human experience. Now look at that woman, you can see that her condition is unfortunate, that is true."

2. The defendant did not put upon the stand a single witness to controvert the plaintiff's witnesses as to the terrible plight and condition of the plaintiff.

3. Plaintiff's counsel in the closing argument said:

> "Now, gentlemen, if there was one mistake that the plaintiff's lawyers in this case made, it is that when my partner drew the petition in the case he only asked for Twenty-Five Thousand Dollars; that is the one mistake, if any, that was made in this lawsuit, particularly for this woman. That is

the one mistake and only mistake and I ask you, as men good and true, who understand what life means, who understand what health means above all other attributes of human beings, to give to this woman every single penny that is asked, we ought to have asked for Fifty Thousand Dollars instead of Twenty-Five Thousand Dollars."

4. Look at photographs of the plaintiff, page 97, and 101, taken shortly before the accident. She weighed 160 pounds, (97); in perfect health, "good color, and bright clear eyes, athletic," she was a perfectly normal woman up to the time "of the accident" (340); she had a "rosy" complexion; she had never had treatments by any doctor prior to her injury and she had never been sick in any way, shape or form prior to the injury. She played the piano and saxophone "used to swim and target practice" (231), "played golf and engaged in almost all athletics," "danced and sang" (231); at the time of the trial she was "but a shadow of her former self," "she looks lifeless, pepless" (322), "she talks incoherently, she will talk to you for instance, and break off in the middle of the sentence, and start talking about something else, she drags her right foot like a hemiplegiac, she can't wash dishes, she would drop the dishes" (310); "she can't carry on her business as a hair dresser," etc., etc. Her right side is paralyzed and she is now a confirmed invalid.

When the defendant admitted upon the trial that Myrtle and Imogene told the truth, and frankly stated to the jury that it was wholly unnecessary for the plaintiff to put upon the stand 21 witnesses to prove

"the condition of this poor woman," how in the name of justice can it be said that the small verdict for her of Twenty-Five Thousand Dollars was the result in whole or in part of the argument complained of? Isn't it true that the plaintiff's lawyer who drafted the petition and asked for only Twenty-Five Thousand Dollars made a mistake? Isn't it clear that the reason why the defendant did not make a motion for a new trial and assign as one of the grounds excessive damages is because the defendant knew that the trial judge saw this poor woman and would not grant a new trial on that ground? The defendant ought not to be permitted by indirection under a writ of certiorari to raise an issue as to the amount of damages which it could not do under a writ of error.

Conclusion.

These cases were tried before Judge Merrill E. Otis, one of the ablest Federal judges in the west. As such trial judge he was in a better position to know what the defense was than any appellate judge could possibly be. He held that our argument was proper "in view of the examination of the witnesses and of the testimony in the case." If there is any doubt about the propriety of his ruling that doubt should be resolved in his favor. It is only in cases of clear abuse of discretion that an appellate court will reverse the trial court.

We may be entirely wrong in our surmise, but it seems to us that the writs of certiorari were issued in these cases primarily because the language em-

ployed by Judge Symes is seemingly in conflict with the affirmance of the judgments. But it is evident that the Court of Appeals in upholding the judgments believed that the judgments were for the right parties, and that taking everything into consideration justice required that the judgments be affirmed.

We believe it would be a wholesome precedent for this Court to rule that in cases like these the party complaining of alleged improper argument shall first exhaust his remedies in the trial Court by moving for a new trial, and/or asking for a rehearing in the Court of Appeals before this Court will entertain a petition for a writ of certiorari. Fairness to the trial Court and the Court of Appeals seems to demand such a ruling.

We confidently believe that had the defendant asked the Court of Appeals for a rehearing and called that Court's attention to these matters, that that Court upon reflection would have modified the language employed in its opinion, and hence these cases would not be in this Court.

We respectfully urge that the writs be dismissed and the judgments be affirmed.

Respectfully submitted,

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